

and conditions. The Commission indicates that it intends to adopt rules to implement Section 703 of the Act, the main section addressing poles, attachments and rights-of-way, in one or more separate rulemaking proceedings, but it requests comments on certain limited issues posed by the new Sections 224(f) and (h) of the Communications Act of 1934. These comments are due on May 20, 1996.

APPA assumes that it will have an opportunity to state its views on the effects of Section 703 on consumer-owned electric utilities when the Commission initiates its proceeding to implement that section of the Act. However, having promised the Commission an integrated analysis of the way in which the key provisions of the Act apply to consumer-owned electric utilities, APPA believes it may be useful to address the threshold issue of coverage by Section 703 here, at least preliminarily.

In Section 703(1), the Act amends the definition of a "utility" in Section 224(a)(1) of the 1934 Act to include "a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications." In Section 703(7), the Act imposes upon all firms meeting the new definition of "utility" an obligation to "provide a cable television system or any telecommunications carriers with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." Elsewhere, Section 703 authorizes the Commission or the States to regulate the rates, terms and conditions for access to pole attachments, prescribes timetables for issuing regulations to implement Section 703, and specifies some of the key requirements that the Commission's regulations must contain.

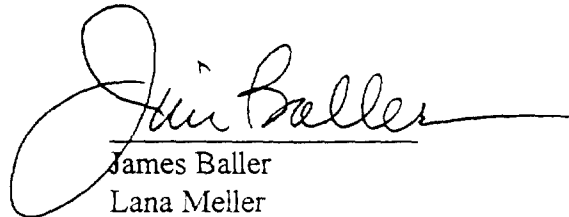
From the standpoint of consumer-owned electric utilities, the key issue is that Section 703(1) left intact the limitation in Section 224(a)(1) of the 1934 Act that the term "utility" does not include "any railroad, any person who is cooperatively organized, or any person who is owned by the Federal Government or any State." Section 703(1) also did not alter Section 224(a)(3) of the 1934 Act,

which defines the term "State" as "any State, territory, or possession of the United States, the District of Columbia, *or any political subdivision, agency or instrumentality thereof* (emphasis added)." Section 703 thus preserved and reaffirmed the consumer-owned electric utilities' historical exemption from the Commission's requirements pertaining to poles, attachments and rights-of-way.

Conclusion

With appropriate incentives, consumer-owned electric utilities can play a important role in bringing competition to the emerging field of telecommunications. APPA submits that the Commission should do all that it can to encourage such involvement. At the very least, the Commission should do nothing to discourage consumer-owned electric utilities from participating in the development of the NII.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jim Baller", with a large, stylized initial "J" and a horizontal line extending from the end of the signature.

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May 16, 1996

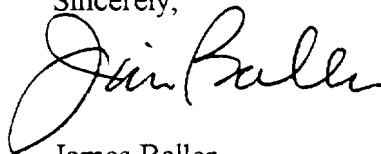
Ms. Janice Myles
Federal Communications Commission
Common Carrier Bureau
1919 M Street, N.W.
Room 544
Washington, D.C. 20554

Re: In the Matter of Implementation of the Local Competition
Provisions of the Telecommunications Act of 1996
CC Docket No. 96-98

Dear Ms. Myles:

Enclosed are a hard copy and a diskette version of the Comments of the American Public Power Association in the rulemaking referenced above.

Sincerely,

A handwritten signature in black ink, appearing to read "Jim Baller", written in a cursive style.

James Baller

Enclosures

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May 17, 1996

Ms. Janice Myles
Federal Communications Commission
Common Carrier Bureau
1919 M St. N.W.
Room 544
Washington, D.C. 20554

Re: In the Matter of Implementation of the Local Competition
Provisions of the Telecommunications Act of 1996
CC Docket No. 96-98

Dear Ms. Myles:

Here is another diskette containing the Comments of the American Public Power Association in the rulemaking referenced above.

Sincerely,


James Baller

RECEIVED

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

SEP 30 1996

Federal Communications Commission
Office of Secretary

In the Matter of:)
)
Implementation of the Local) CC Docket No. 96-98
Competition Provisions of the)
Telecommunications Act of 1996)

To the Commission:

PETITION OF THE
AMERICAN PUBLIC POWER ASSOCIATION
FOR CLARIFICATION OR RECONSIDERATION OF
THE COMMISSION'S FIRST REPORT AND ORDER

Pursuant to Section 1.429 of the Rules of the Federal Communications Commission, the American Public Power Association ("APPA") hereby petitions the Commission for clarification or reconsideration of the portion of its First Report and Order on local competition that addresses the definitions of "telecommunications services" and "telecommunications carriers." First Report and Order ¶¶ 993-94, as released August 8, 1996, and corrected on August 20, 1996.¹ For the most part, the Commission's discussion of these definitions is consistent with the Act and its legislative history and would promote competition by encouraging consumer-owned electric utilities to make telecommunications infrastructure and facilities available to prospective providers of telecommunications services. One parenthetical sentence, however, contains an ambiguity that could adversely affect consumer-owned electric utilities in ways that the Commission does not appear to have intended. APPA urges the Commission to remove or clarify that sentence.

¹ Hereafter, APPA will cite the Commission's official summary of the First Report and Order in 61 Fed. Reg. 45,475 (August 29, 1996) ("Summary of First Report and Order").

Interest of APPA

APPA is the national service organization for approximately 2000 consumer-owned electric utilities throughout the Nation, located in every state except Hawaii. For more than a century, consumer-owned electric utilities have played a vital role in furnishing essential local competition in the electric power industry. They are now well-situated to play a similar role in the field of telecommunications.

Over the next few years, hundreds of consumer-owned electric utilities will need to upgrade their telecommunications infrastructure to support their core business of providing electric service at ever increasing levels of efficiency and reliability. The sophisticated telecommunications infrastructure that these utilities will need for their own purposes can support the provision of video, voice, data and other interactive telecommunications services by the electric utilities themselves or by other providers of such services.

By encouraging consumer-owned electric utilities to make their facilities available for these purposes, the Commission can simultaneously accelerate the pace of deployment of the National Information Infrastructure, promote competition, ensure universal service, and minimize wasteful, costly and duplicative burdens on streets, poles, ducts, conduits and rights of way. The Commission can also help preserve essential competition among consumer-owned and privately-owned providers of electric service.

APPA has participated in various rulemakings to implement the Telecommunications Act in order to help the Commission understand how its decisions may affect APPA's members and to encourage the Commission to take actions that would give consumer-owned electric utilities a full and fair opportunity to provide or facilitate the provision of telecommunications services. APPA is filing this petition in furtherance of these objectives.

Discussion

Under Section 3(49) of the Act, the term “telecommunications carrier” means “any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226).” Section 3(51), in turn, defines “telecommunications service” as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.” The key operative terms are “for a fee” and “directly to the public.” By using these terms at the urging of utilities, Congress reflected its intent to exclude at least the following categories of services from the Act: a utility’s own internal usage of its telecommunications facilities; a utility’s provision of telecommunications support to other instrumentalities of government; a utility’s provision of telecommunications on a private-carriage basis, as distinguished from a common-carriage basis; and a utility’s provision of telecommunications infrastructure -- such as “dark fiber” or wholesale capacity -- to persons who are themselves in the business of furnishing telecommunications services for a fee directly to the public.²

In its First Report and Order, the Commission finds that

A “telecommunications carrier” is defined [in the Act] as “any provider of telecommunications services A telecommunications carrier shall be treated as a common carrier under the Act “only to the extent that it is engaged in providing telecommunications services” A “telecommunications service” is defined as “the offering of telecommunications for a fee directly to the public or to such classes of users as to be as to be effectively available to the public. *We conclude that to the extent a carrier is engaged in providing for a fee domestic or international*

² The legislative history of the nearly identical definition of “telecommunications service” in S.1822 in the prior Congress indicates that Congress did not intend the Act to apply to “the offering of telecommunications facilities for lease or resale by others for the provision of telecommunications services.” S. Rep. No. 103-367, 103d Cong., 2d Sess. (September 14, 1994). In fact, Congress expressly stated that “[t]he offering by an electric utility of bulk fiber optic capacity (i.e., ‘dark fiber’) does not fall within the definition of telecommunications service.” *Id.*

telecommunications, directly to the public or to such classes of users as to be effectively available to the public, the carrier falls within the definition of "telecommunications carrier."

Summary of First Report and Order ¶ 658, 61 Fed. Reg. at 45,572 (emphasis added). This definition, the Commission notes, "is consistent with the 1996 Act, and there is nothing in the record in this proceeding that suggests that this definition should not be adopted. *Id.*

The Commission then illustrates the application of these definitions with the following examples:

We conclude that cost-sharing for the construction and operation of private telecommunications networks is not within the definition of "telecommunications services" and thus such operators of private networks are not subject to the requirements of section 251(a). We believe that such methods of cost-sharing do not equate to a "fee directly to the public" under the definition of "telecommunications service." Conversely, to the extent an operator of a private telecommunications network is offering "telecommunications" (the term "telecommunications" means "the transmission, between or among points specified by the user, of information of the user's choosing, without change in form or content of the information as sent and received" 47 U.S.C. § 153(43)) for a fee directly to the public or to such classes of users as to be effectively available directly to the public (*i.e.*, providing a telecommunications service), the operator is a telecommunications carrier and is subject to the duties in section 251(a).

Summary of First Report and Order ¶ 660, 61 Fed. Reg. at 45,573.

The Commission's conclusions, findings and examples indicate that, to be deemed a "telecommunications carrier," a person must *both* charge "a fee directly to the public or to such classes of users as to be available directly to the public" *and* provide domestic or international "telecommunications," as defined in the Act. APPA agrees with these definitions and with the Commission's determination that both the Act and the record in this proceeding support them.

The Commission's discussion quoted above is simple, straightforward and unambiguous. Unfortunately, the First Report and Order concludes this discussion with a sentence that could lend itself to misinterpretation:

Providing to the public telecommunications (e.g., selling excess capacity on private fiber or wireless networks), constitutes a telecommunications service and thus subjects the operator to the duties of section 251(a) to that extent.

Summary of First Report and Order ¶ 660, 61 Fed. Reg. at 45,573. On the one hand, this sentence can be interpreted to mean that the term “telecommunications service” includes the use of excess capacity on private fiber or wireless networks *if* the user sells “telecommunications,” as defined in the Act, “for a fee directly to the public or to such classes of users as to be as to be effectively available to the public.” Such an interpretation would be consistent with the Act and would cause no substantive problems. On the other hand, the sentence can be interpreted to mean that “selling excess capacity on private or wireless networks,” without more, can be sufficient to meet the definitions of “telecommunications” or “telecommunications service” in the Act. Not only would that interpretation be contrary to the Act -- e.g., by failing to account for the essential statutory element of transfer of information without change -- but it would also be counterproductive. By discouraging electric utilities from making telecommunications infrastructure and facilities available to third parties that would, in turn, provide “telecommunications service” for a fee directly to the public, the end result would be less local competition, higher prices and greater burdens on streets, poles, attachments, and rights of way.

Given the language and legislative history of the Act and the Commission’s own analysis preceding the sentence quoted above, APPA does not believe that the Commission intended the latter interpretation of that sentence. APPA urges the Commission to make this clear, as incumbent providers of telecommunications services are likely to use any and all ambiguities in the Commission’s orders to hinder or delay competition at the local level.

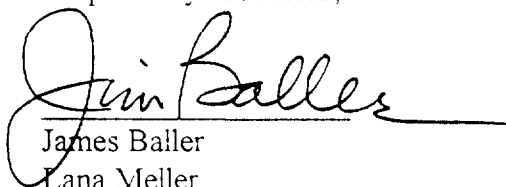
Alternatively, if the Commission did intend that interpretation, then APPA urges the Commission to reconsider its position. Although consumer-owned electric utilities have vast

potential as providers or facilitators of telecommunications service. they are subject to intense public scrutiny and local control, which has historically served as a forceful and effective alternative to federal and state regulation. Local control over major policy decisions is particularly important to communities that support publicly-owned electric utilities because these communities bear the entire financial risk of failure.

In these circumstances, regulation by a distant authority, which would follow from classifying a consumer-owned electric utility as "telecommunications carrier," or even the perception that the nature and scope of such regulation is uncertain and could ultimately diminish local control, could cause many local governments to deny or delay approval of their electric utility's involvement in telecommunications activities. Any such fears, moreover, would surely be reinforced by well-financed incumbent and potential telecommunications service providers.

APPA submits that the Commission should do everything possible to encourage consumer-owned electric utilities to become active participants in bringing competition to the emerging field of telecommunications. Granting this petition would be a small but important step in that direction.

Respectfully submitted,

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of:)	
)	
Implementation of the Local)	CC Docket No. 96-98
Competition Provisions of the)	
Telecommunications Act of 1996)	

To the Commission:

REPLY COMMENTS OF THE
AMERICAN PUBLIC POWER ASSOCIATION

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May 30, 1996

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of:)	
)	
Implementation of the Local)	CC Docket No. 96-98
Competition Provisions of the)	
Telecommunications Act of 1996)	

To the Commission:

**REPLY COMMENTS OF THE
AMERICAN PUBLIC POWER ASSOCIATION**

In its opening comments, the American Public Power Association (APPA) urged the Commission to interpret every provision of the Telecommunications Act of 1996 in this and other rulemaking proceedings in the way that would most forcefully encourage consumer-owned electric utilities to provide or foster competition in the telecommunications industry, as they have done with great success in the electric power industry for the last century. APPA maintained that congressional intent to encourage consumer-owned electric utilities to play a vital role in building the National Information Infrastructure is reflected throughout the Act and its legislative history and should therefore come to pervade the Commission's regulations as well. APPA illustrated these points by discussing the Act's key definitions, the Act's broad measures for preempting state and local requirements that might discourage electric utilities from providing telecommunications services, and the Act's extension and reinforcement of the exemption from regulation of poles, attachments and rights of way that consumer-owned utilities have historically had.

Having reviewed the opening comments filed by numerous other participants in this proceeding, APPA has found none that directly or indirectly opposes the points that APPA has made.

To the contrary, several commenters confirmed one or more of APPA's positions. For example, UTC, The Telecommunications Association, representing approximately 1000 privately-owned and consumer-owned utilities and pipelines on telecommunications matters, played a prominent role in the congressional debates that led to the key definitions in the Act. In its comments, UTC interpreted these definitions in precisely the same way as APPA. Similarly, like APPA, numerous commenters urged the Commission to interpret the preemption provisions of the Act broadly in order to promote competition in the telecommunications industry. Likewise, the "Municipal Utilities" reinforced APPA's points about the extension of the consumer-owned electric utilities' exemption from regulation of poles, attachments and rights of way.

APPA's Reply Comments

In addition to the comments that APPA has already presented to the Commission, it offers the following points in response to opening comments filed by certain other parties to this proceeding.

As the Commission knows better than anyone else, the challenge of establishing a competitive telecommunications industry is a daunting one that is fraught with danger. For all concerned, including the Commission, the stakes and risks are high, and any errors made now could have serious long-term consequences. In many cases, the issues at hand are so multi-faceted and dynamic that they do not lend themselves to general prescriptions. At the same time, a period of experimentation and observation would greatly enhance the Commission's decision-making. In the context of this proceeding, APPA urges the Commission to defer issuing specific rules or guidelines at this time and to proceed instead on a case-by-case basis in the following two areas.

1. The Commission Should Not Issue Specific Rules or Guidelines on Preemption at this Time in the Context of this Proceeding

Noting that the Commission has not proposed specific rules or guidelines to define the scope of the preemption provisions in Section 253 of the Act, a handful of commenters have urged the Commission to do so in this proceeding. For example, Cox Communications suggests that the Commission use its general rulemaking powers to issue regulations that would spell out the “types” of state and local requirements that would be permissible or impermissible. Cox’s Comments at 55-59. According to Cox, this would reduce the number of case-by-case adjudications and would render those that do occur simpler for the Commission to decide. *Id.* Similarly, the National Cable Television Association (NCTA) states that the Commission “can and should rule now that burdensome certification proceedings and geographic service requirements constitute effective barriers to entry. Providing this guidance now would reduce regulatory costs and minimize case-by-case litigation.” NCTA’s Comments at 68-72. While APPA supports Cox’s and NCTA’s goals, it agrees with the Municipal Utilities’ point that the Commission should not issue rules or guidelines in this proceeding but should address preemption issues on a case-by-case basis.

At the outset, Section 253(d) of the Act itself prescribes the method by which the Commission must address preemption issues -- notice-and-comment proceedings on a case-by-case basis. This requirement of a hybrid of adjudication and rulemaking procedures reflects Congress’s recognition that the Commission’s preemption decisions are likely to be highly sensitive, with potentially far-reaching results. They should therefore be based on specific facts rather than abstractions, and all interested parties should have an opportunity to participate by filing comments. The Commission should honor both the letter and spirit of Section 253(d), even if some delays inevitably occur.

Second, Section 253(b) states that nothing in the Act is intended to preclude States from issuing “competitively neutral” requirements that would “preserve and advance universal service, protect public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.” As these exceptions to the Act’s preemption provisions are inherently fact-specific, any attempt to promulgate a comprehensive set of detailed rules or guidelines would inevitably fall short and would surely spawn precisely the kind of costly and time-consuming litigation that the rules or guidelines were intended to prevent or minimize. At the same time, little purpose would be served by issuing broad, general rules or guidelines, as the Act and its legislative history have already achieved that end by making clear that the Commission should be vigilant in eliminating state and local requirements that explicitly or implicitly impose barriers to entry.

Third, even if it made sense for the Commission to issue rules or guidelines at some point, the record in this proceeding would not support doing so at this time. The Commission did not publish any specific proposed rules or guidelines, nor did it give the relevant issues more than fleeting attention in its Notice of Proposed Rulemaking. As a result, very few commenters addressed the preemption issue at all, and none purported to do so comprehensively. In these circumstances, any rules that the Commission issued would be subject to legal challenge, and even guidelines would be of questionable legality. APPA therefore submits that, if the Commission believes issuing detailed rules or guidelines would be desirable, it should initiate a specific proceeding for that purpose.

At a minimum, if the Commission decides to go forward with rules or guidelines at this time, it should make clear that they are for illustrative purposes only.

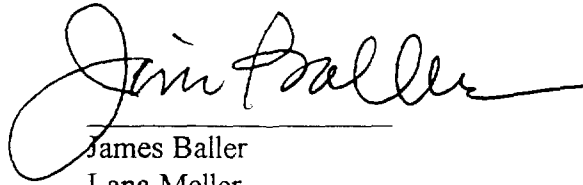
2. The Commission Should Not Issue Specific Rules or Guidance in This Proceeding to Define the Scope of the Access Provisions of the Act as Applied to Electric Utilities

As APPA discussed in its opening comments, its members are generally exempt from the access and other requirements added to Section 224 of the 1934 Act by Section 703 of the 1996 Act. Nevertheless, on the basis of its vast experience with electric power, APPA agrees with the comments that UTC, Municipal Utilities and numerous other electric utilities that have filed to urge the Commission to give electric utilities broad latitude in determining when granting access to their poles, attachments, conduits, ducts and rights of way would threaten the safety or reliability of their electric service. Furthermore, APPA agrees with these commenters that the circumstances in which such questions may arise are so diverse and complex that the Commission should not seek to establish rules of general applicability but should instead adopt rules that encourage good-faith negotiations among interested parties and provide for case-by-case determinations if the negotiations fail to produce mutually satisfactory results.

Conclusion

As stated in APPA's opening comments, the Commission should do everything in its power to encourage consumer-owned electric utilities to play an important role in bringing competition to the emerging field of telecommunications. At the very least, the Commission should do nothing to discourage such involvement. APPA submits that, taken as a whole, the opening comments filed in this proceeding either affirmatively support APPA's position or are not inconsistent with it.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jim Baller", with a horizontal line underneath it.

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May 30, 1996